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No. 87-852

In The
Supreme Court of the United States
October Term, 1987

UNION OIL COMPANY OF CALIFORNIA,
Petitioner,

v.

SIERRA CLUB,
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the Ninth Circuit err in holding that Union Oil Company was not entitled to rely upon an upset defense to violations of its wastewater discharge permit, when the state permitting agency had expressly excluded such a defense from the permit and Union Oil did not exhaust state administrative remedies before asking the district court to insert such a defense in its permit?

2. Did the Ninth Circuit err in holding that Union Oil was not entitled to contest, on the basis of alleged sampling and testing errors, the validity of its own self-monitoring reports admitting these permit violations?

3. Does any of these questions pose an issue of sufficient legal or factual significance to warrant review by this Court?

RULE 28.1 LISTING

Respondent Sierra Club has no parent companies, subsidiaries or affiliates.

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Respondent Sierra Club opposes the petition for certiorari to review the Ninth Circuit's reversal of the district court's judgment.

STATEMENT OF THE CASE

This action was brought under Section 505 of the Clean Water Act, 33 U.S.C. § 1365, to enforce the terms of a wastewater discharge permit issued to petitioner by the

State of California.[1] In the district court, respondent presented uncontroverted evidence that petitioner's own self-monitoring reports showed that certain discharges had exceeded the limitations in the permit.[2] Nevertheless, the district court excused most of these violations as "upsets" because they occurred during periods of heavy rainfall. Pet. App. at 31-32.[3] Although the permit contained no "up-

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1 California has adopted its own system for permitting wastewater discharges in the form of the Porter-Cologne Water Quality Control Act, set forth in California Water Code Sections 13000 *et seq.*, and specifically Sections 13370-13389. On this basis, the federal Environmental Protection Agency ("EPA") delegated to California the authority to administer the Clear Water Act's National Pollution Discharge Elimination System ("NPDES") in California. *See* 33 U.S.C. § 1342(b). NPDES permits are issued by the State's Regional Water Quality Control Boards. *See* Cal. Water Code § 13377. The state-issued permits must contain effluent standards at least as strict as those promulgated by EPA, but may contain more stringent pollution control standards. 33 U.S.C. § 1370; 40 C.F.R. §§ 122.1(f), 123.1(i), 123.25(a).

2 California law provides that permit compliance will be monitored and reported by the discharger; that the discharger operating under a state permit must install, use and maintain monitoring equipment and must sample its effluents; and that the discharger must report the results of that monitoring to the state permit-issuing agency in a self-monitoring report at intervals which are to be specified in the permit. *See* Cal. Water Code §§ 13225(b), 13267(b), 13268, 13383, 13387(b); 23 Cal. Admin. Code §§ 2235 *et seq.* This is consistent with the approach taken in the Clean Water Act for the NPDES program. *See* 33 U.S.C. § 1318(a)(4)(A); 40 C.F.R. § 122.41(l)(4).

3 References to the opinions below will be made to the pages in the appendices to the petition. Also, in this brief, documents in the record on appeal will be referred to by the docket numbers in the district court Clerk's Record ("CR"), the Reporter's Transcript of the trial is cited as "RT", and plaintiff's and defendant's trial exhibits are cited as "Pl.Tr.Ex." and "Def. Tr.Ex.".

set defense," the district court held that California law required that it be read into this *state-issued* permit because federal law requires its inclusion in *federally-issued* permits. *Id.* at 33.

The Ninth Circuit disagreed, but not for the reasons which petitioner assigns for review by this Court. The Ninth Circuit held that an upset defense was not available because the permit did not contain one, because the States may set more stringent permit limits by omitting the federal upset defense, because the State of California had done so here by not incorporating the upset defense in the permit explicitly or by reference, and because petitioner's failure to raise these issues before the state permitting agency or in an action to review the terms of the permit barred it from raising these issues in an enforcement proceeding. Pet. App. at 9-14.

Thus, petitioner is simply wrong in asserting that the Ninth Circuit denied petitioner an upset defense because it "interpreted the Clean Water Act to prohibit permit exceedences due to an unsual event where the unusual event is likely to occur over the life of a plant." Pet. at 9. Nor is it correct to state that "[t]his understanding of the law lies at the core of the Court's decision" denying to petitioner an upset defense. *Id.*

Regardless of the merits of *that question*, the Ninth Circuit determined *in this case* that as a matter of state law petitioner was not entitled to assert an upset defense. It then considered as an alternative ground for its holding whether petitioner had in this case met the specific requirements of the upset defense promulgated in the EPA regulations. It was only in this context that the court ex-

amined the capacity of petitioner's treatment facility to determine whether it was adequately designed to handle "unusual rains." Pet. App. at 17. Even then, the Ninth Circuit was simply construing the EPA regulations, which preclude reliance on the federal upset defense for violations resulting from "improperly designed" or "inadequate treatment facilities." 40 C.F.R. § 122.41(n)(1). Moreover, this particular factor was only one among a number of independent criteria that the court determined petitioner had failed to meet as a prerequisite to complying with the federal regulations.[4]

Nevertheless, in this Court, petitioner portrays itself as the victim of "vicious," "killer" storms, which on one occasion even produced "a rare snowfall to nearby Mt. Diablo." Pet. at 5. Beyond such anecdotes, the fact is that at trial petitioner's expert admitted that he could not ascribe any violations to a drop in temperature[5] and that only a hydrologist could evaluate properly the relative magnitude of these storms.[6] The only hydrologist at the

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[4] Although the district court read the federal upset defense into petitioner's state permit, it never bothered to determine whether petitioner had met the specific requirements of that defense in the EPA regulations, 40 C.F.R. § 122.41(n). In reversing the district court's decision on this alternative ground, the Ninth Circuit meticulously reviewed the hypothetical application of the federal regulation to this case. It found that the district court had erred in applying the upset defense (i) to exceedances of permit limitations which were based on the quality of the receiving water rather than the technology used, (2) to operator errors, (3) to inadequate facilities, and (4) to exceedances for which petitioner had failed to comply with the specific procedural requirements of the federal upset regulation. Pet. App. at 14-18.

[5] RT 525-6. In fact the temperature of the plant's influent never dropped below its design specifications. RT 618.

[6] RT 510.

trial testified that in these two winter seasons *no* monthly total rainfall (relevant to monthly average violations), and only *one* daily total rainfall (relevant to daily maximum violations), was greater than what could be expected every five years.[7] Indeed, petitioner has shown itself incapable of complying with its permit even in the driest weather.[8]

Finally, for seven permit violations, petitioner is unhappy with the Ninth Circuit because it refused to allow petitioner to impeach its own self-monitoring reports. Peti-

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[7] RT 637-652; Pl.Tr.Exs. 33 and 34; Union Oil's Response to Sierra Club's Interrogatory No. 52. The district court did not reach a different conclusion, since it decided to exempt petitioner from any violations for the entire six months of each of these two winters, because the *six month totals* of rainfall were high. Pet. App. at 32. In this respect, the district court simply ignored the fact that the permit parameters violated were not six-month averages but *daily* maximum concentrations of pollutants and *monthly* averages.

[8] During the four years preceding the winter of 1981-82, petitioner reported 54 violations of its permit. CR 183 at Exh. B, pp. 1, 3-6, and Def.Tr.Ex. X. From December 1982 to April 1986 (when respondent filed its opening brief on appeal) petitioner had reported 85 more violations. CR 183, App. B, p.2; Def.Tr.Ex. X; public files of Regional Board (Evid. Rule 201(b)(2)). In fact, petitioner's performance since December 1982 has been so poor that the Regional Water Quality Control Board issued a Cease and Desist Order requiring construction of a larger treatment facility and requested that the California Attorney General prosecute Union Oil for civil penalties and injunctive relief. *See* Addenda C and D to Sierra Club's Opening Brief on Appeal. For these reasons, this Court's recent decision in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 56 U.S.L.W. 4017 (December 1, 1987), does not require any further consideration of whether respondent made good faith allegations in its complaint of continuing permit violations by petitioner. In fact, even prior to petitioner's many recent violations, the district court specifically determined that respondent had alleged continuing permit violations by petitioner. *Sierra Club v. Union Oil Co.*, 15 E.L.R. 20890, 20891 (N.D. Cal. 1985).

tioner does not dispute that it reported exceedances in these instances. Rather it sought below to discredit them as "apparently the result of sampling errors," or as not showing "meaningful analytical results," or as an "anomaly."[9] The Ninth Circuit accepted the position of EPA as *amicus curiae* that to allow the discharger *post hoc* to impeach its own self-monitoring reports would undermine the entire permit enforcement scheme. Pet. App. at 20-21; U.S. Br. at 26-28.

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[9] Debuse Declaration ¶¶ 46, 48, 70 [CR 46]. The evidence in the district court did not support these contentions. With respect to three of these violations, the *contemporaneous* reports prepared by petitioner's employees concluded that the cause of these violations was "unknown", rather than positively concluding that they were sampling or testing errors, as petitioner now asserts. Def.Tr.Ex. F (3/31/83 and 4/5/83) memos). In its brief to the Ninth Circuit, petitioner also attempted to excuse two TOC violations by citing statistical evidence based on the extraordinary premise that reported violations must be in error whenever they fall outside the statistical range of values obtained when the permit was not violated (Br. at 10, citing RT 247 and Def.Tr.Exs. D and E). In any event, the evidence in the trial court showed that petitioner's statistical range (expressed in net values: effluent values minus influent values) had been skewed by the use of a dirty influent sample bottle. RT 371, 581-2; Pl.Tr.Ex. 9. Finally, petitioner asserted in its brief to the Ninth Circuit that two other violations resulting from its failure to report any sample results should be excused because "meaningful results could not be obtained from these samples" (Br. at 8). But petitioner's witnesses agreed with respondent's expert that its failure to report values for these samples could be due to a "chemist's error." RT 572, 376.

REASONS FOR DENYING THE WRIT

1. As petitioner itself concedes, the Ninth Circuit reversed the district court's allowance of an upset defense "because they interpreted differently *the effect of a state law.*" Pet. at 13 (emphasis added). The Ninth Circuit held that California's more stringent water quality law did not allow the upset defense to be "read into" this *state-issued* permit simply because it was required in a *federally-issued* permit. Pet. App. at 12-14. Since this Court's "general practice is to place considerable confidence in the interpretations of state law reached by the federal courts of appeals,"[10] this case does not present the usual occasion for invoking this Court's plenary review. Indeed, petitioner does not point to any error in the Ninth Circuit's conclusions regarding state law.

2. Petitioner cannot brush aside this construction of state law by asserting that "the requirements of the Clean Water Act" are controlling. Pet. at 13. The only provision of the Clean Water Act of relevance here is Section 510's undeniable grant of authority to States to set more stringent standards than those under federal law.[11] Yet, petitioner never argues that California's exclusion of the upset defense in this permit was an abuse of its authority to set more stringent standards. The granting of certiorari would thus be inappropriate because, as this Court observed in another context:

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[10] *Pacific Gas and Electric Company v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190, 214 (1983). *See also Mills v. Rogers*, 457 U.S. 291, 306 (1982); *Bishop v. Wood*, 426 U.S. 341, 346 (1976).

[11] 33 U.S.C. § 1370; *see Environmental Protection Agency v. California*, 426 U.S. 200, 218 (1976) ("Section 510 quite plainly was intended to strengthen state authority.")

> "[I]t would be particularly pointless for us to engage in such inquiry here when it is clear that the States have been allowed to retain authority . . . . In these circumstances, it should be up to Congress to determine whether a State has misused the authority left in its hands."[12]

3. Moreover, the Ninth Circuit's decision is in accord with EPA's regulations, which specifically authorize the States to exclude the upset defense from their permits, in recognition of their authority to set more stringent standards. *See* Pet. App. at 5-6 (citing the note to 40 C.F.R. § 123.25(a)). Again, petitioner never suggests that this Court review whether *EPA's construction* of the Clean Water Act is unreasonable and contrary to Congressional intention—the only circumstance which would justify any departure from the "considerable deference" accorded by this Court to EPA's construction of the Act.[13]

4. There is an even more fundamental reason why the petition must be denied: petitioner failed to exhaust the administrative remedies available for seeking inclusion of an upset defense in its permit. Over twelve years ago, the State expressly declined petitioner's request that an upset defense be included in its permit. Petitioner never sought judicial review of that ruling, never argued to the state agency that this ruling was in any way defective, and never sought, indeed, to get an upset defense included in its permit on the subsequent occasions when it was

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[12] *Pacific Gas and Electric Company v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190, 216 (1983). *See also id.* at 222-223.

[13] *Chemical Manufacturers Association v. Natural Resources Defense Council*, 470 U.S. 116, 125 (1985). *See also Environmental Protection Agency v. California*, 426 U.S. 200, 227 (1976).

issued. Although acknowledging that its failure to exhaust administrative remedies was one of the grounds of the Ninth Circuit's decision,[14] petitioner does not offer this as a reason for granting the writ and does not assert that the Ninth Circuit committed any error in this regard.[15]

5. Nor should this Court accept petitioner's invitation to decide *any* issue relating to an upset defense when the context for such review is a permit enforcement action and the permit itself contains no upset defense. Section 505(f)(6) of the Clean Water Act, which petitioner cites as the jurisdictional basis of this action (Pet. at 2-3), defines the subject of the suit as "a permit or condition thereof issued under section 1342 of this title," and the Act itself specifically prohibits challenges to the terms of a permit in an enforcement action. 33 U.S.C. § 1369 (b)(2).[16] Surely, this Court's plenary review is not

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[14] Pet. at 8 n.12. The Ninth Circuit detailed the "several administrative routes that [Union Oil] could have taken to protest the permit's terms," both when the permit was "issued and reissued." Pet. App. at 10. As the Court noted, on any of these occasions, petitioner could have sought modification of its permit from the state agency, could have requested that the EPA Administrator object to the failure to include an upset defense and could have sought review in the Court of Appeals of the EPA Administrator's failure to object to the permit's terms. *Id.* at 10-11. In fact, although the permit was reissued and amended several times after 1974, petitioner *never even requested* the inclusion of an upset defense.

[15] Even so, this application of the exhaustion doctrine is so clearly in accord with the decisions of this Court, that further review by this Court is unnecessary. *See, e.g., United States v. L. A. Tucker Truck Lines*, 344 U.S. 33, 37 (1952); *United States v. Ruzicka*, 329 U.S. 287, 292-293 (1946); *Unemployment Compensation Commission v. Aragon*, 329 U.S. 143, 155 (1946).

[16] In *Environmental Protection Agency v. California*, 426 U.S. 200, 222-224 (1976), this Court emphasized that such enforce-

(Continued on following page)

properly invoked for the purpose in effect of "amending" state-issued permits under the Clean Water Act.

6. In any event, the granting of certiorari would not redress petitioner's grievance in this case. Although petitioner acknowledges that the Ninth Circuit determined that it had not complied with the federal upset defense *even if it were applicable* (Pet. at 8 n.13), petitioner offers no argument that the Ninth Circuit erred in this alternative holding. And, petitioner does not suggest that this Court should itself undertake to re-examine the details of the violations and determine whether or not each of the several independent EPA criteria has been satisfied in the same meticulous way that the Ninth Circuit has already done. Thus, even if this Court were to reinstate the district court's amendment of petitioner's permit to include such a defense, the defense would remain inapplicable

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ment actions are to be decided according to the terms of the permit. In particular this Court noted that a suit against a permit holder will necessarily be brought under the definition in subsection 505(f)(6), that this subsection uniquely focuses on the water pollution standards or limitations *"as translated into the conditions of an NPDES permit"* (426 U.S. at 223, emphasis in original), and that the plaintiff in an enforcement action under this subsection must show "violation of the permit condition" (*id.*) whether those conditions arise from standards promulgated by EPA "or from stricter standards established by the State" (*id.* at 224).

Indeed, the principal case relied upon by petitioner, *Marathon Oil Company v. Environmental Protection Agency*, 564 F.2d 1253, 1273 (9th Cir. 1977) (Pet. at 7, 12), held that the upset defense must be contained within the body of *federally-issued* permits, precisely because enforcement actions are limited to the terms of the permit. As the Ninth Circuit pointedly observed, the *Marathon Oil* case was not an enforcement suit but an action for review of the EPA Administrator's decision to exclude the upset defense from a permit. Pet. App. at 10-11 n.4.

because the Ninth Circuit determined that its specific requirements had not been met. In these circumstances, this Court should decline to exercise its discretionary review.[17]

7. Finally, for seven violations, petitioner seeks review of the Ninth Circuit's refusal to allow petitioner to present *post hoc* evidence at trial impeaching its own self-monitoring reports of these permit violations. Petitioner's argument that it was thereby deprived of due process was obviously fashioned in an effort to pique this Court's interest; the argument was never made to the Ninth Circuit, even in the petition for rehearing.[18] However, none of the cases cited by petitioner suggests that there is any deprivation of due process in requiring a party to stand behind *its own* sampling and the reports that *it files* under penalty of perjury.[19] Where the enforcement system is entirely dependent on *self-monitoring* and is intended to be based on "a minimum of discretionary decision making or delay,"[20] as here, the Ninth Cir-

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[17] *See The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 183 (1959) (dismissing certiorari as improvidently granted since the proceedings below were maintainable on another ground); *cf. United States v. Hastings*, 296 U.S. 188, 193 (1935) (when decision below supported by another basis not subject to examination in this Court, review would represent "an expression of an abstract opinion").

[18] Petitioner thus simply ignores this Court's admonition that it will not pass on arguments not presented to the courts below. *See, e.g., United States v. Ortiz*, 422 U.S. 891, 898 (1975); *McCullough v. Kammerer Corp.*, 323 U.S. 327, 328-329 (1945).

[19] Nothing in petitioner's permit precludes it from immediately taking additional samples when it has reason to suspect error or from routinely taking split or dual samples to provide a basis for double checking its sampling.

[20] S. Rep. No. 414, 92nd Cong., 1st Sess. 64, *reprinted in* 1972 U.S. Code Cong. & Ad. News 3668, 3730.

cuit properly concluded that to allow petitioner to impeach its own sampling results at trial "would be sanctioning countless additional hours of NPDES litigation and creating new, complicated factual questions for district courts to resolve." Pet. App. at 21.[21] In this respect and others, the Ninth Circuit followed the position urged upon it by EPA as *amicus curiae*. U.S. Br. at 26-28.

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[21] In this case, as described *supra* at note 9, petitioner's assertions of self-monitoring errors were in fact not supported by the evidence.

CONCLUSION

The petition presents no occasion for this Court to resolve any conflict between the Ninth Circuit's decision and that of any other circuit, or of this Court, or EPA's construction of the Clean Water Act. It raises no issues of national significance in interpreting that Act because fundamentally the decision of the Ninth Circuit is based on its undisputed interpretation of state law, its unquestioned application of the doctrine of exhaustion of administrative remedies, and its acceptance of EPA's positions regarding the operation of the Act's enforcement system. The petition for certiorari should accordingly be denied.

Respectfully submitted,

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